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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 542

IN THE MATTER

of

The Application of the RICHMOND COUNTY SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, for an order directing the transfer of its assets and funds to the STATEN ISLAND MENTAL HEALTH SOCIETY, INC.

STATEN ISLAND MENTAL HEALTH SOCIETY, INC.,
Appellant,

RICHMOND COUNTY SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, THE CHILDREN'S AID SOCIETY, MISSION OF THE IMMACULATE VIRGIN FOR THE PROTECTION OF HOMELESS AND DESTITUTE CHILDREN and the STATE OF NEW YORK,
Appellees.

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 5-3

IN THE MATTER

of

The Application of the RICHMOND COUNTY SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, for an order directing the transfer of its assets and funds to the STATEN ISLAND MENTAL HEALTH SOCIETY, INC.

STATEN ISLAND MENTAL HEALTH SOCIETY, INC.,
Appellant,

RICHMOND COUNTY SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, THE CHILDREN'S AID SOCIETY, MISSION OF THE IMMACULATE VIRGIN FOR THE PROTECTION OF HOMELESS AND DESTITUTE CHILDREN and the STATE OF NEW YORK,
Appellees.

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF.

Comes now the appellee Mission of the Immaculate Virgin for the Protection of Homeless and Destitute Children (hereinafter "Mission") and moves this Court pursuant to its Rule 16 to dismiss the appeal herein upon the following grounds:

1. It does not present a substantial federal question;

2. No federal question was expressly passed on by the New York Court of Appeals;

3. The order of the New York Court of Appeals appealed from rests on an adequate non-federal basis.

Statement.

The Jurisdictional Statement of appellant, which was delivered to this appellee on October 17, 1961, violates the implicit requirement of Rule 15 of this Court that it be accurate. It substitutes argument for fact and departs repeatedly from the record in the New York Court of Appeals on which the order appealed from was entered. Such tactics are designed to somehow convince this Court that it has jurisdiction of this appeal under 28 U. S. C. Sec. 1257 (2). The results of these tactics are the contrived federal questions which appellant claims are present.

This Court is entitled to the following accurate statement of the essential facts and of the progress of this proceeding through the courts of New York, supported in every respect by the record.

Richmond County Society for the Prevention of Cruelty to Children (hereinafter "SPCC"), a New York membership corporation, the purposes of which were "the prevention of cruelty to children and the enforcement of the laws relating to or in any wise affecting children", ceased to operate in Staten Island, New York in mid-1949 and was dissolved. Its board of directors thereafter instituted the subject *cy pres* proceeding in Supreme Court, Richmond County pursuant to the applicable statute (A-12-13)* seek-

* References are to pages of the appendices to the Jurisdictional Statement.

ing an order authorizing the transfer of all funds and assets of SPCC to appellant Staten Island Mental Health Society, Inc. (hereinafter "Mental Health"). Appellee The Children's Aid Society (hereinafter "Children's Aid"), the Mission and other charities were allowed to intervene and participated, together with the Attorney General of the State of New York, in a two day non-jury trial leading to Judge Baker's unrecorded decision (A-8-10) on which an order was entered July 9, 1957 directing, in substance, the division of the funds of SPCC equally between Children's Aid and the Mission.

Mental Health's motion for a new trial and other relief was denied by Judge Baker (A-10-11).

As noted, the Attorney General of the State of New York, acting through one of his assistants, took an active part in the hearings and took no appeal from the determination thereof.* Illustrative of appellant's use of unauthenticated, non-record material are its arguments on pages 7-9 of the Jurisdictional Statement relating to the Attorney General and referring to an alleged conversation with "the Attorney General's office" and a letter from the Solicitor General of the State of New York. Neither item, of course, was ever part of the record herein and references thereto are as immaterial as they are improper.

Appellant's appeal from the orders entered pursuant to Judge Baker's decisions resulted in the *per curiam* decision and opinion of the Appellate Division, Second Department (A-4-8) holding that an unsuccessful claimant in a *cy pres* proceeding had no standing to appeal since it was not a party or person aggrieved within the meaning of the

* It is clear that he was duty bound to do so if he believed that a wrong class of beneficiaries had been selected *cy pres*, a duty which is in no way contingent upon the number of charities involved (A-7, 12; *Matter of Durbrow*, 245 N. Y. 469).

controlling statute, New York Civil Practice Act, §557 (A-13). The Appellate Division noted (A-8) that although there were New York cases in which appeals by unsuccessful *cy pres* claimants had been entertained, the point of their right to appeal had not been raised therein and in some the Attorney General had appealed.* It also noted (A-8) that appellant had no inherent right to appeal because it was a party to the proceeding at Special Term and that nothing could confer such right of appeal absent statutory authority. This, of course, disposed of the argument that the appellees, who had moved to dismiss the appeal well before it was argued, had somehow waived their right to raise the point of appellant's right to appeal. The time within which an appeal may be taken has nothing to do with the timeliness of a motion to dismiss an appeal.

The New York Court of Appeals affirmed the order of the Appellate Division, Second Department (A-1). Its remittitur was amended to allow costs upon appellant's motion but it declined to amend the remittitur so as to include a statement that federal questions were argued and necessarily passed upon by it. The appellant appeals from the order of affirmance of the New York Court of Appeals entered May 18, 1961 (A-2-4).

Thus no New York appellate court reached the merits of the disposition *cy pres* ordered by Judge Baker. Notwithstanding this fact, appellant has presented argument of the merits *in extenso* in its Jurisdictional Statement. It ignores Children's Aid and contends essentially that the disposition ordered by Judge Baker was error because the Mission is sectarian and an award to it of nonsectarian

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* *Matter of Directors of Equitable Fire and Police Fund*, 267 App. Div. 761, which merely affirmed orders permitting intervention, did not raise the point of the right of an unsuccessful *cy pres* claimant to appeal.

funds violates the Constitution of the United States. On this basis it asks this Court *inter alia* to reverse all of the New York courts without plenary consideration and oral argument.

To support its position appellant has included in the Jurisdictional Statement (p. 17) a portion of a pamphlet published by the Mission for the purposes of circulation among and solicitation of funds from Roman Catholic patrons of the child-caring institution conducted by the Mission, which pamphlet was an exhibit to the Mission's brief after trial,* and has based its allegations that the Mission is a "sect" and sectarian thereon. In its treatment of this matter of the merits, however, appellant assiduously avoided the record which, for example, contains the Mission's certificate of incorporation providing for nonsectarian purposes and practices. The record also affirmatively establishes that the Mission follows a nonsectarian intake policy and practice to the extent permitted by New York law (A-15) in caring for homeless, destitute and neglected children regardless of race, color or creed.

Appellant similarly urged its version of the merits on the New York Court of Appeals which refused to consider the same in light of the only issue before it, viz., the right of appellant, an unsuccessful claimant in a *cy pres* proceeding, to appeal. This is clear even from the decision of the minority in the Court of Appeals (A-1).

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* This pamphlet was never printed as part of the record but was included in briefs submitted to the New York courts and referred to as one of the documents on which Judge Baker's order denying appellant's motion for a new trial and other relief was entered. Because it was not a record paper contemplated by Rule 12 of this Court, objection to its transmittal has been made and filed in this Court.

POINT I.

There is no substantial federal question present on this appeal.

The holding of the New York Court of Appeals did not change the New York law of *cy pres* by making the same *prerogative* rather than *judicial* as contended by appellant in its Jurisdictional Statement (pp. 11-13). The proceedings in the New York State courts were obviously judicial in character and the decisions therein allow appeal in *cy pres* proceedings by the Attorney General. Moreover, the New York appellate courts properly found persuasive the decisions of Massachusetts and Connecticut. These jurisdictions and, in fact, all jurisdictions of the United States, have always rejected any form of prerogative *cy pres*. See *Scott on Trusts*, §§348.3, 399.1; *Restatement of Trusts*, §399.

As noted, the point of the right of an unsuccessful *cy pres* claimant to appeal was not raised, much less decided, in New York before the instant proceeding (A-8). Appellant, of course, had the opportunity, and availed itself of it fully, to present its case at Special Term. Its only real complaint now is that its best laid plans have gone awry.

Accordingly appellant's claim that the order appealed from is novel and prejudicially retroactive so as to warrant review by this Court is factually and legally untenable. It is not supported by *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673 and *National Association for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449.

In the *Brinkerhoff* case an aggrieved taxpayer sought review by this Court on a record which indicated that he

could obtain no relief from an alleged discriminatory assessment in Missouri in that his property had been exacted with no opportunity to be heard and to defend against the exaction. The statement of the governing principles by this Court disposes of appellant's contentions herein (pp. 680-682):

> "It is true that the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; that this Court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court.
>
> "But our decision in the case at bar is not based on the ground that there has been a retrospective denial of the existence of any right or a retroactive change in the law of remedies. We are not now concerned with the rights of the plaintiff on the merits, although it may be observed that the plaintiff's claim is one arising under the Federal Constitution and, consequently, one on which the opinion of the state court is not final; or with the accuracy of the state court's construction of the statute in either the *Laclede* case or in the case at bar. Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the state court had the power to construe the statute dealing with the State Tax Commission; and to re-examine and overrule the *Laclede* case. Neither of these matters raises a federal question; neither is subject to our

review.[8] But, while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.[9] • • •

"[8] The process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law. Since it is for the state courts to interpret and declare the law of the State, it is for them to correct their errors and declare what the law has been as well as what it is. State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions. • • •

"[9] Had there been no previous construction of the statute by the highest court, the plaintiff would, of course, have had to assume the risk that the ultimate interpretation by the highest court might differ from its own. Likewise, if the administrative remedy were still available to the plaintiff, there would be no denial of due process in that regard."

Here, of course, there had been no previous construction of the New York statute governing appeals as related to unsuccessful *cy pres* claimants and consequently appellant was in the position of the aforementioned plaintiff who had to assume the risk that the ultimate interpretation by the highest State court might differ from its own, which it did. Moreover, appellant had a full hearing before Judge Baker who also entertained its motion for a new trial and heard the same at length. Due process does not require that an appellant be given a right to appeal. *National Union* v. *Arnold*, 348 U. S. 37, 43 (1954).

The *NAACP* case, which followed *Brinkerhoff*, involved a contrived novel State procedural requirement designed

to frustrate a colored appellant and is manifestly not even remotely germane.

There being no substantial federal question present on this appeal, this Court should dismiss the appeal. *Palmer Oil Corp.* v. *Amerada Petroleum Corp.*, 343 U. S. 390, 391 (1952); *CIO* v. *McAdory*, 325 U. S. 472, 477 (1945); *Abrams* v. *Van Schaick*, 293 U. S. 188, 189 (1934).

POINT II.

No federal question was expressly passed on by the New York Court of Appeals.

Despite appellant's application that the Court of Appeals amend its remittutur to state that federal questions were necessarily passed upon by it, that Court refused to do so and denied appellant's motion to so amend its remittitur. This action of the Court of Appeals makes clear its opinion that no federal question was expressly passed on by it. While admittedly this is not conclusive on this Court, it is entirely consistent with the record and highly indicative of the fact that no federal question was passed on by the New York Court of Appeals. Therefore there should be no review by this Court. *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52, 54 (1934).

POINT III.

The order appealed from rests on an adequate non-federal basis.

The sole question before the New York Court of Appeals was the correctness of the decision of the Appellate Division of the Supreme Court, Second Department, that an unsuccessful claimant in a *cy pres* proceeding was not a party

aggrieved and hence had no right of appeal under the New York Civil Practice Act, §557 (1) (A-4-8, 13). There was no consideration by such New York courts of appellant's alleged constitutional questions and arguments because these courts found that appellant had no legal right or interest in the funds transferred and hence no standing on appeal to urge such questions and arguments (cf. *Schieffelin* v. *Komfort*, 212 N. Y. 520, 533; *Bull* v. *Stiehman*, 273 App. Div. 311, aff'd 298 N. Y. 516) (A-7).

The right of appeal in New York is a creature of the New York statute, CPA §557 (1), which it was the duty and right of the New York courts to interpret. *People ex rel. Schick* v. *Marvin*, 271 N. Y. 219. This they did and held, as a matter of New York law, that appellant, an unsuccessful *cy pres* claimant, had no right to appeal. Consequently, the order appealed from rests on a perfectly sound State basis and, therefore, on an adequate non-federal basis. There should be no review by this Court. *Herb* v. *Pitcairn*, 324 U. S. 117, 125 (1945).

Conclusion.

The motion to dismiss the appeal should be granted.

October 31, 1961

Respectfully submitted,

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Vincent R. FitzPatrick,
Counsel for Mission of the Immaculate Virgin for the Protection of Homeless and Destitute Children.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 503.

IN THE MATTER

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The Application of the RICHMOND COUNTY SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, for an order directing the transfer of its assets and funds to the STATEN ISLAND MENTAL HEALTH SOCIETY, INC.

STATEN ISLAND MENTAL HEALTH SOCIETY, INC.,
Appellant,

RICHMOND COUNTY SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, THE CHILDREN'S AID SOCIETY, MISSION OF THE IMMACULATE VIRGIN FOR THE PROTECTION OF HOMELESS AND DESTITUTE CHILDREN and the STATE OF NEW YORK,
Appellees.

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF.

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STATEN ISLAND MENTAL HEALTH SOCIETY, INC.,
Appellant

RICHMOND COUNTY SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, THE CHILDREN'S AID SOCIETY, MISSION OF THE IMMACULATE VIRGIN FOR THE PROTECTION OF HOMELESS AND DESTITUTE CHILDREN and the STATE OF NEW YORK,
Appellees.

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF.

Appellee, The Children's Aid Society, moves the Court to dismiss the appeal herein on the following grounds:

1. It does not present a substantial federal question;

2. No federal question was expressly passed on by the New York Court of Appeals;

3. The order of the New York Court of Appeals appealed from rests on an adequate non-federal basis.

Statement.

The Jurisdictional Statement follows the pattern used continuously by appellant since the Court of original jurisdiction decided that the appellees, Mission of the Immaculate Virgin for the Protection of Homeless and Destitute Children (hereinafter "Mission") and The Children's Aid Society, were most nearly akin to the old Richmond County Society for the Prevention of Cruelty to Children (hereafter "SPCC") and ordered distribution of the funds of the SPCC to them. Appellant always retried the whole case inside and outside the record and forced The Children's Aid Society to range far and wide in its briefs in the hope that it could answer most if not all of the statements appellant put forward. Illustrative of this is The Children's Aid Society's brief to the Court of Appeals on the appeal from the decision of the Appellate Division, Second Department, a copy of which is submitted herewith.

Appellant states in its Jurisdictional Statement (p. 6) that S. P. C. C. "chose to proceed under the *cy pres* statute, with a strong case to support the director's judgment". Here it is dealing in irrelevancies and does not tell the whole story. Appellant does not call to mind that in 1955 counsel for S. P. C. C. argued its right to withdraw the *cy pres* application and that the then counsel for appellant filed a brief in support of the motion to withdraw. This was at the time of the application of The Children's Aid Society and other charities to intervene. The motion to withdraw was not pursued. Actually it was not a proper motion for these were public funds under the jurisdiction of the Supreme Court which in New York has jurisdiction over charities. Once the condition of the S. P. C. C. was brought to the Court's attention, it had to act in the matter.

Matter of Herman, 177 Misc. 276, Supreme Court, Cattaraugus County. This matter is not pertinent and with but one more omission in regards to the letters of the Attorney General, irrelevant statements of appellant will go unchallenged.

This proceeding involved the funds of the S. P. C. C. which had closed its doors in 1949 and was thereafter dissolved. The board of directors of the S. P. C. C. petitioned the Court for leave to transfer its funds to appellant, Staten Island Mental Health Society, Inc. (hereinafter Mental Health). The Children's Aid Society, the Mission and several other societies were allowed to intervene and after a trial in the Supreme Court of Richmond County in which the Attorney General participated fully, the funds were ordered by Judge Baker (A8-10) to be distributed as indicated above. After denial of the right to a new trial, appellant appealed and its appeal was dismissed (A4-8) on the ground that appellant was not a party aggrieved. This decision was affirmed by the Court of Appeals (A-1) which, while amending its remittitur to allow costs, failed to include a statement in the remittitur that federal questions were argued and necessarily passed upon. Appellant appeals from the order of affirmance of the New York Court of Appeals (A2-4).

It is clear that the sole question in the appellate courts was the right of a disappointed *cy pres* claimant to appeal.

This appellee, The Children's Aid Society, is no more than a name in appellant's brief. The Children's Aid Society is non-sectarian as all will admit, but appellant does not bother to state. Appellant also neglects to state that the letter writing Solicitor General subsequently and by letter apologized for his famous letter as far as The Children's Aid Society was concerned and then we heard no

more from him. No basis exists here for reversal by this Court as asked by appellant in its Jurisdictional Statement (p. 22).

This appellee asks the Court to go forward with the Court of Appeals and dismiss this appeal.

POINT I.

There is no substantial federal question present on this appeal.

The confusion as to prerogative and judicial *cy pres* has settled heavily upon appellant's argument. However interesting a study of *cy pres* might be, it is safe to say that without such an exacting and unsatisfactory voyage, one can reach the conclusion that prerogative *cy pres* was never a part of judicial procedure in these United States. RESTATEMENT OF TRUSTS §399.

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673 is not authority for appellant on this appeal. While the question of whether a disappointed *cy pres* claimant was a party aggrieved had never been raised nor adjudicated in New York, decisions had disposed of other cases on this ground. *Matter of Hodgman*, 140 N. Y. 421, *Bryant* v. *Thompson*, 128 N. Y. 426. All the Court of Appeals and the Appellate Division did was decide that appellant was not aggrieved. It was not a new theory, but an application of an old one. Here also appellant had its day in the Court of original jurisdiction. Again unlike the cases of *Brinkerhoff* and *National Association for Advancement of Colored People* v. *Alabama*, 357 U. S. 449, appellant had no property or right which was affected. While the funds were given to the Mission and this appellee, nothing was taken from appellant and the non-appealing charities who were involved.

Appellant had no interest in the funds which the Constitution could protect. The Attorney General represented the beneficiaries of the fund. *Trustees of Sailors Snug Harbor* v. *Carmody*, 158 App. Div. 738, aff'd 211 N. Y. 286. The public welfare is in the hands of the Attorney General, not in the hands of appellants.

POINT II.

No federal question was expressly passed on by the Court of Appeals.

The appellant requested the Court of Appeals to state that a federal question was necessarily passed upon and that Court failed to do so. It is clear that the Appellate Division decision (A4-8) did not consider federal questions and it would seem to follow logically that the Court of Appeals in affirming did not consider such questions either. There should be no review by this Court. *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52, 54.

POINT III.

The order appealed from rests on an adequate non-federal basis.

Appellate jurisdiction is purely statutory. In New York it is governed by §557 (1), (A-13). Appellant failed to show it was aggrieved and therefore it could not complain in the appellate courts. This rule in New York covers all appeals and is not unique or different in its application to charitable cases. Appellant must have suffered a loss of right or property before it can appeal. Appellant was not in a position to object in the State Appellate Courts. *Matter*

of Hodgman, supra. It is not in a position to object here, *Lampasas* v. *Bell*, 180 U. S. 276. *The Winebago*, 205 U. S. 354.

Conclusion.

The motion to dismiss the appeal should be granted.

November 3, 1961.

Respectfully submitted,

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Counsel for The Children's Aid Society.